Supreme Court, U.S.
FILED

No. 10-1123 DEC 20 2010

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In The
Supreme Court of the United States

ELIZABETH SAMS TUETKEN

Petitioner,

v.

LANCE EDWARD TUETKEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State of Tennessee violate the constitutionally protected rights of parents to rear their children without unwarranted state intervention in ruling that parenting issues may not be submitted to binding arbitration pursuant to the Uniform Arbitration Act, based upon the doctrine of *parens patriae*?

2. Did the State of Tennessee violate the constitutionally protected right of its' citizens to equal protection under the law by depriving parents of the right to utilize binding arbitration as provided for under the Tennessee Uniform Arbitration Act to resolve parenting disputes?

PARTIES TO THE PROCEEDING

Petitioner is Elizabeth Tuetken.
Respondent is Lance Edward Tuetken.

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In the Supreme Court of the United States

ELIZABETH SAMS TUETKEN

V.

LANCE EDWARD TUETKEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Rachael E. Putnam, on behalf of Elizabeth Sams Tuetken, respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 320 S.W.3d 262 (Tenn.2010). Pet.App. 1a-13a. The opinion of the Tennessee Court Appeals is unreported and can be found at 2009 WL 2391235. Pet.App. 14-18.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on September 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person...equal protection of the laws." The Uniform Arbitration Act is reproduced in the appendix to this petition. Pet.App.26-47.

STATEMENT

The Petitioner and Respondent are ex spouses who, at the time of their divorce, had two minor children. Following the filing of post-divorce petitions pertaining to the two minor children, the parties agreed to submit their post-divorce parenting disputes to binding arbitration. The Consent Order

Appointing Arbitrator specifically set forth all issues and subject matter which would be subject to arbitration in the event a dispute arose between the parties. The Consent Order Appointing Parenting Arbitrator was entered by the Trial Court on June 28, 2006.

On August 15, 2007 the Trial Court entered an Order Incorporating August 15, 2007 Decision of the Parenting Arbitrato- Respondent filed his Notice of Objections to the Ruling of the Arbitrator on August 28, 2007. On December 7, 2007 the Trial Court conducted a hearing on Respondents Notice of Objections. On January 8, 2008, the Trial Court entered an Order on Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator.

Petitioner Appealed the Trial Court's Order on Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator on the basis that the Trial Court had no basis to modify the Arbitrator's ruling pursuant to the Uniform Arbitration Act. The Tennessee Court of Appeals entered its judgment on August 5, 2009 affirming the Trial Court's judgment. The Court of Appeals reasoned that the parties had not engaged in binding arbitration governed by the Uniform Arbitration Act but rather, the parties had entered into Alternative Dispute Resolution and

therefore the Trial Court's Order modifying the arbitrator's award was proper.

Petitioner filed her Application for Permission to Appeal on October 5, 2009. On page 9 of the Petitioner's Application for Permission to Appeal, the Petitioner raised the issue of whether the Uniform Arbitration Act was being applied differently by the Court of Appeals due to her case being a post divorce custody proceeding. Petitioner asserted that the Uniform Arbitration Act should be applied in the same manner in custody matters as it is applied in all other types of litigation wherein the parties have agreed to submit their dispute to binding arbitration.

On December 14, 2009, the Tennessee Supreme Court granted Petitioner's application for permission to appeal. After the Petitioner filed her supplemental brief, the Tennessee Supreme Court, directed Petitioner to submit an additional brief addressing the following question: "Whether binding arbitration of child custody disputes is inconsistent with Tennessee statutes requiring trial judges to resolve custody issues in the best interest of children." Pet. App. 11. The Court directed the Petitioner to review the cases of *Harvey v. Harvey*, 680 N.W.2d 835 (Mich. 2004); *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009); and *Kelm v. Kelm*, 749 N.E.2d

299 (Ohio 2001).

On February 15, 2010, Petitioner submitted her Second Supplemental Brief wherein she raised the constitutionally protected right to privacy which encompasses the right of parents to rear their children without unwarranted state interference pursuant to the Fourteenth Amendment of the United States Constitution. Pet. App. 16-25. Petitioner argued that absent a finding by a Court that a substantial threat of harm to a child exist, Courts do not have the right to impose themselves upon two parents and to interfere in the parental decision making process. Petitioner further argued that the right to parental autonomy should not evaporate simply because a divorce occurs.

On September 22, 2010, the Tennessee Supreme Court held that the Tuetken's had entered into binding arbitration governed by the Uniform Arbitration Act. However, the Tennessee Supreme Court went on to hold that the parties' Consent Order Appointing Parenting Arbitrator contained a mutual mistake as to the scope of the Trial Court's review, in that the parties were found to have attempted to expand the judicial review beyond the scope of review set forth in the Uniform Arbitration Act. Based upon this mutual mistake, the Court

found that rescission of the parties' agreement to arbitrate was justified. The Court reversed the judgment of the Court of Appeals affirming the trial court's order modifying the arbitrator's ruling.

Due to the matter being remanded to the Trial Court for further proceedings, the Court went on to hold that ***parenting issues may not be submitted to binding arbitration in Tennessee because such arbitration eliminates the Trial Court's determination of the children's best interest***. Justice Holder of the Tennessee Supreme Court, relying upon the doctrine of *parens patriae*, found "that the state has a right 'paramount to any parental or other claim, to dispose of such children as their best interests require.'" Pet.App 9. The court went on to explain, that while Tennessee had recognized that "[T]he state lacks justification to interfere with the fundamental right of parents of an intact marriage to raise their children absent a showing of harm to the child, (citation omitted)... harm to a child is implicit in a divorce proceeding." Pet.App 9. The Tennessee Supreme Court opinion specifically states that "[I]t is well established that parents cannot bind the court with an agreement

affecting the best interest of their children." Pet.App. 9. Following that logic, the opinion goes on to conclude that if parents cannot bind the court by an agreement affecting the interest of their children, they cannot bind the court by agreeing to let someone else, an arbitrator, make such a decision for them. Pet.App.9.

REASONS FOR GRANTING THE PETITION

The Tennessee Supreme Court has entered a judgment that violates the constitutionally protected rights of parents living within the borders of the State of Tennessee to rear their children without unwarranted state interference. That judgment is wrong and warrants this Court's review.

The fundamental right of parents to make decisions regarding their children has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Troxel, et vir., v. Tommie Granville*, 530 U.S. 57, (2000);*Wisconsin v. Yoder*, 406 *U.S.* 205, (1972); *Prince v. Massachusetts*,

321 *U.S.* 158, (1944)

The right of parents to select binding arbitration as the forum in which their parenting issues will be determined is encompassed within the constitutionally protected right of parents to make private decisions about the way their children will be raised. Absent a finding of harm, the private realm of the family should not be entered uninvited by the state.

Based upon the doctrine of *parens patriae*, the Tennessee court summarily disposes of a parent's right to make a mutual decision to submit parenting issues to binding arbitration. The Tennessee court invokes the doctrine of *parens patriae* based upon their finding that inherent harm is experienced by children when their parents divorce. The Tennessee court opinion threatens to establish a class of parents who, as a result of seeking a divorce, are no longer entitled to the same protection under the law as afforded to all other parents. It should be noted that while the Tennessee court argues that it is the inherent harm to children incident to a divorce that allows for the state to step in, the opinion specifically prohibits "parenting issues" from being submitted to binding arbitration. Pet.App.10. The Tennessee court's opinion bars any parent, whether married,

divorced, and/or never married from submitting parenting issues to arbitration. This result calls into question what basis the state has to prohibit non-divorcing parents from submitting matters to arbitration.

At the core of this issue lies the struggle to protect the sacrosanct relationship between parents and their children from interference by the state, and a State's duty to protect all minor children within its jurisdiction from harm based upon the doctrine of *parens patriae*.

This Court has held that a State may interfere with parental autonomy, when harm to the health or welfare of a child exists. When considering whether or not this constitutional protection includes the right of parents to decide to submit parenting issues to binding arbitration, the state courts have reached contradictory conclusions. An opinion from this Court is needed in order to clarify whether the rights provided to parents under the Fourteenth Amendment of the United States Constitution includes the right to choose to submit parenting issues to binding arbitration.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of Tennessee, at Jackson

Elizabeth Sams TUETKEN
v.
Lance Edward TUETKEN
No. W2008-00274-SC-R11-CV
April 7, 2010 Session.
Sept. 22, 2010.

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*264 Adam N. Cohen and Mitchell D. Moskovitz, Memphis, Tennessee, for the appellee, Lance Edward Tuetken

OPINION

JANICE M. HOLDER, C.J., delivered the opinion of the Court, in which CORNIELIA A. CLARK, GARY R. WADE, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

JANICE M. HOLDER, C.J.

We granted appeal in this case to determine the trial court's scope of review of the parties' arbitration award. After thoroughly reviewing the record, we conclude that the parties entered into binding arbitration governed by the Tennessee Uniform Arbitration Act ("TUAA") and reaffirm our holding in *Pugh's Lawn Landscape Co., Inc. v. Jaycon*

Development Corp., 320 S.W.3d 252, 254 (Tenn.2010), that the judicial review of an arbitration award is confined to the grounds enumerated in the TUAA. The provision in the parties' arbitration agreement modifying the trial court's scope of review therefore is invalid, and the invalidity of this provision is a mutual mistake justifying rescission of the parties' agreement to arbitrate. Because our holding necessitates additional proceedings on remand, we further hold that parenting issues may not be submitted to binding arbitration in Tennessee because such arbitration eliminates the trial court's determination of the children's best interests. We therefore reverse the judgment of the Court of Appeals, vacate the judgment of the trial court, and remand the case to the trial court for further proceedings consistent with this opinion.

I. Facts and Procedural History

Elizabeth Sams Tuetken ("Mother") filed a complaint for divorce in the Shelby County Circuit Court on March 13, 2001, against Lance Edward Tuetken

("Father"). The trial court entered a final decree of divorce on January 31, 2003, incorporating a parenting plan reflecting the trial court's ruling on issues related to the parties' son and daughter, who were ages eleven and six, respectively, at the time of trial. The parenting plan designated Mother as the primary custodial parent and required Father to pay child support. The parenting plan also addressed the children's schedules, the allocation of decision-making authority between Mother and Father, the children's daily care, and the rights of each parent when the children were not in his or her care.

In 2004 and 2005, Mother and Father filed cross-motions for civil contempt, each alleging that the other had failed to abide by one or more provisions in the parenting plan. In addition, Mother requested that Father's child support be modified to reflect an increase in his earnings. In anticipation of the entry of a consent order permitting arbitration of the parties' disputes, an arbitration hearing was held on June 20, 2006. On June 27, 2006, a "Parenting Arbitrator" submitted preliminary findings of fact and conclusions of law to the parties and requested that the parties review the document for clerical errors.

On June 28, 2006, the trial court entered a "Consent Order Appointing Parenting Arbitrator" ("consent order"). The consent order embodied the parties' agreement to arbitrate and provided the Parenting Arbitrator with the authority "to make decisions regarding the best interests of the parties' minor children." FN1 The consent*265 order detailed the manner in which an appeal from the Parenting Arbitrator could be initiated. The consent order also stated, " *There is no confidentiality as to any evidence presented at such hearings.*"

FN1. The consent order reserved to the trial court a determination of the contempt motions and listed the following decisions as included in the authority of the Parenting Arbitrator:

a. Interpreting, implementing, ordering and changing parenting times, terms or conditions, including but not limited to changes in Primary Residential Parenting status;

b. Interpreting, implementing, ordering and changing telephone or correspondence contact;

c. Interpreting, implementing, ordering and changing orders regarding exchange and/or transportation of the child, including specific time, place and cost of exchange;

d. Interpreting, implementing, ordering and changing education, daycare, and/or extra-curricular activities for the child;

e. Making orders more specific so as to avoid violation of Court orders;

f. Interpreting, implementing, ordering or changing the times for religious observances and religious training for the child, if any;

g. Determining and ordering the appropriate medical, mental health, and counseling treatment (including psychotherapy, substance abuse counseling, domestic violence counseling, parenting, or anger management classes) or therapy;

h. Ordering psychological testing of either or both parents or the minor children;

i. Interpreting, implementing, ordering and changing child support and any other support required for the children;

j. Any other issue of any nature, with the exception of contempt of court, which shall remain under the sole control of the Court.

The Parenting Arbitrator was required to decide all issues and to set forth findings of fact and conclusions of law if requested by either party. The parties agreed that a party challenging the Parenting Arbitrator's ruling was required to file a motion with the trial court within ten calendar days of receipt of the Parenting Arbitrator's ruling. The consent order further provided that "[i]n the event of an appeal, the decision of the arbitrator shall be binding on the parties pending the resolution of the matter by the Trial Court, and said decision shall carry with it a presumption of correctness." The parties also initialed a provision acknowledging "that the orders of the Parenting Arbitrator can be reviewed by the Court." If neither party filed a timely objection, "the Parenting Arbitrator shall cause his or her order to be signed by the Court."

Father filed a motion in the trial court objecting to the Parenting Arbitrator's June 27, 2006 decision. The Parenting Arbitrator thereafter filed amended findings and conclusions with the trial court requiring the parties to complete their child support worksheets and participate in another arbitration hearing to resolve issues concerning the education of the parties' son. Father filed a motion to continue the parties' second scheduled arbitration until his objections to the Parenting Arbitrator's June 27, 2006 decision could be heard by the trial court. He also filed a petition in the trial court to reduce his child support.

The trial court entered an order on May 18, 2007, ruling that Father was required to submit all issues to the Parenting Arbitrator in accordance with the consent order and that Father's motions had been raised prematurely. The trial court therefore denied Father's motion objecting to the Parenting Arbitrator's June 27, 2006 decision and dismissed his petition to reduce child support.

The Parenting Arbitrator conducted additional arbitration hearings. On August 15, 2007, she submitted her findings of fact and conclusions of law to the trial court and to the parties. These findings addressed child support, the son's education, both children's uninsured medical expenses, transportation of the children between*266 Mother and Father, and the parties' attorneys fees.

Father filed in the trial court a notice of objections to the Parenting Arbitrator's decision. On August 31, 2007, the trial court entered an order incorporating the Parenting Arbitrator's decision. In response to Father's motion seeking a ruling on his objections,

Mother asserted that the parties had agreed to binding arbitration governed by the Tennessee Uniform Arbitration Act ("TUAA") and that the TUAA permits modification of an arbitrator's decision only under limited circumstances. *See* Tenn.Code Ann. §§ 29-5-312 to -314 (2000).

On December 7, 2007, the trial court conducted a hearing on Father's objections. The trial court determined that it was not prohibited by the TUAA from modifying the Parenting Arbitrator's ruling. The trial court then modified the Parenting Arbitrator's ruling as to three issues and expressly reserved five issues for an evidentiary hearing in addition to any other issues not completely adjudicated.

Mother appealed the trial court's order modifying the arbitrator's ruling. She based her appeal on section 29-5-319 of the TUAA, which states that "[a]n appeal may be taken from: ... [a]n order modifying or correcting an [arbitrator's] award." [FN2] Tenn.Code Ann. § 29-5-319(a)(4) (2000). The Court of Appeals affirmed the trial court's modification of the Parenting Arbitrator's ruling holding that the parties had agreed to non-binding arbitration governed by Tennessee Supreme Court Rule 31.

FN2. This section provides a limited exception to the rule that a final judgment adjudicating all of the claims, rights, and liabilities of all of the parties is required before an appeal. *See* Tenn. R.App. P. 3(a); *In re Estate of Ridley*, 270 S.W.3d 37, 41 (Tenn.2008). Mother also filed a Tennessee Rule of Appellate Pro-

cedure 9 interlocutory appeal, which the Court of Appeals denied.

II. Analysis

On appeal, the parties do not dispute that the Parenting Arbitrator's decision may be appealed to the trial court. The issue before us therefore concerns only the scope of the trial court's review. Mother asserts that the trial court should apply the narrow scope of review provided in the TUAA, which governs binding arbitration. Father, on the other hand, asserts that the trial court should apply the broader scope of review included in the consent order. Before addressing this issue, we will first determine whether the consent order entered by the trial court provided for non-binding arbitration pursuant to Tennessee Supreme Court Rule 31, as held by the Court of Appeals.

A. Tennessee Supreme Court Rule 31

[1] Rule 31 sets forth the procedures for court-annexed alternative dispute resolution, including non-binding arbitration.[FN3] Tenn. Sup.Ct. R. 31. The goal of court-annexed alternative dispute resolution is to assist the parties in reaching voluntary settlements. *See* Tenn. Sup.Ct. R. 31 app. A, § 10. To

this end, Rule 31 defines "Non-Binding Arbitration" as "a process in which a neutral person ... considers the facts and arguments presented by the parties and renders a decision which is *267 non-binding." Tenn. Sup.Ct. R. 31 § 2(*l*). Pursuant to Rule 31, non-binding arbitration is initiated by the trial court's entry of an Order of Reference, which is permissible only with the parties' consent. Tenn. Sup.Ct. R. 31 § 3(a), (d).

FN3. In addition to non-binding arbitration, the trial court may order the parties, with their consent, to participate in "Mini-Trial[s], Summary Jury Trial[s], or other appropriate alternative dispute resolution proceedings." Tenn. Sup.Ct. R. 31 § 3(d). With or without the parties' consent, the trial court may order the parties to participate in a Rule 31 judicial settlement conference or mediation. Tenn. Sup.Ct. R. 31 § 3(b).

[2] Viewed in its entirety, we conclude that the consent order in this case does not invoke the provisions of Rule 31 related to non-binding arbitration. The parties' agreement vests decision-making authority in the Parenting Arbitrator and provides for an appeal procedure to the trial court. This procedure is foreign to Rule 31. Rule 31, section 21 provides that neutrals serving in non-binding

arbitrations are subject to Rule 31, Appendix A, "Standards of Conduct for Rule 31 Neutrals." In a subsection entitled "Neutral's Role," Appendix A states that "[i]n dispute resolution proceedings, decision-making authority rests with the parties. The role of the Neutral includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements." Tenn. Sup.Ct. R. 31 app. A § 1(b). Accordingly, in non-binding arbitration the parties may accept the result of the arbitration, thereby reaching a voluntary agreement, or they may disagree with the result of the arbitration and return to the court for a resolution in that forum. Rule 31 does not vest decision-making authority in the arbitrator. Because the arbitrator's award is not binding, Rule 31 does not provide for appeal from the arbitrator's decision.

Our conclusion that the consent order is not governed by Rule 31 is reinforced by other provisions of Rule 31. For example, neutrals must "preserve and maintain the confidentiality of all information" obtained during the arbitration proceedings and may not divulge that information without the parties' consent. Tenn. Sup.Ct. R. 31 § 10(d). Also, Rule 31

makes it abundantly clear that information concerning the arbitration proceedings is inadmissible in the trial court. Neutrals filing a final report with the trial court pursuant to Rule 31 must state "only: (i) which parties appeared and participated in the [proceedings]; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Neutral requests that the costs of the Neutral's services be charged as court costs." Tenn. Sup.Ct. R. 31 § 5(a). Rule 31 further provides that "[e]vidence of conduct or statements made in the course of [the ADR proceedings] shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408." Tenn. Sup.Ct. R. 31 § 7. Contrary to these provisions, the parties' consent order emphasizes that " *[t]here is no confidentiality as to any evidence presented* " during the arbitration hearings and requires the Parenting Arbitrator to submit detailed findings and conclusions to the trial court.

In short, the role of the Parenting Arbitrator in this case, as described in the parties' consent order and in actuality, is inconsistent with the role of a neutral in a non-binding arbitration conducted pursuant to Rule 31.

[3] We also put to rest the notion that Rule 31 governs not just non-binding arbitration, but some form of binding arbitration as well. In *Team Design v. Gottlieb,* 104 S.W.3d 512, 528 (Tenn.Ct.App.2002), the Court of Appeals stated that "the 2001 amendments [to Rule 31] appear to permit the parties to agree that an arbitrator's award in a 'non-binding arbitration' proceeding will be 'final and binding,' " relying on Appendix B to Rule 31 in support of its conclusion. *Id.* at 528 & n. 47. Initially, we observe that no provision of Rule 31 provides for binding arbitration. *268 Section 2(*l*), however, defines "Non-Binding Arbitration" as "a process in which a neutral person or a panel ... considers the facts and arguments presented by the parties and renders a decision which is non-binding as set forth in sections 14 and 21 herein." [FN4] Tenn. Sup.Ct. R. 31 § 2(*l*). Section 21 describes Appendix B as a "form order for use by parties and courts in fashioning their own orders for Non-Binding Arbitration." *Id.* at § 21.

FN4. Section 14, entitled "Rule 31 Neutrals in Rule 31 Non-Binding Arbitration," provides

(a) The Parties may select any lawyer in good standing to act as an arbitrator in a non-binding arbitration.

(b) Where the court, pursuant to Section 4, appoints a Rule 31 Neutral to act as an arbitrator in a general civil case, the person appointed shall be a lawyer in good standing and shall have been admitted to practice for at least ten years.

(c) Where the court, pursuant to Section 4, appoints a Rule 31 Neutral to act as an arbitrator in a family case, the person appointed shall be a lawyer in good standing and shall have been admitted to practice for at least ten years, during which time a substantial portion of the lawyer's practice shall have been family cases.

Section 21, entitled "Non-Binding Arbitration," provides in part that "[t]rial courts, with the consent of the parties, are authorized to order Non-Binding Arbitration."

[4] [5] We acknowledge that paragraph 15 of Appendix B permits parties to "stipulate[ ] in writing that the award shall be final and binding." This provision should not be interpreted to alter the substance and intent of Rule 31. "This Court's role in construing statutes is to give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn.2000). The

traditional rules of statutory construction also apply to the construction of the Rules of the Tennessee Supreme Court. *See Doe v. Bd. of Prof'l Responsibility of Supreme Ct. of Tenn.*, 104 S.W.3d 465, 469 (Tenn.2003). Consistent with the substantive provisions of Rule 31, the language in Appendix B simply permits parties to agree to make binding *the result* of their non-binding arbitration. Paragraphs 15 and 17 support this conclusion. The arbitrator may issue an award at which time the parties may stipulate that the award "shall be final and binding." Tenn. Sup.Ct. R. 31 app. B, ¶ 15. Then, "[u]pon stipulation of the parties, the clerk shall, in accordance with Rule 58, Tennessee Rules of Civil Procedure,[FN5] enter the award as the judgment of the court." Tenn. Sup.Ct. R. 31 app. B, ¶ 17 (footnote added). The agreement of the parties thereby becomes a consent order with "the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise." Tenn. Sup.Ct. R. 31 app. B, ¶ 17. This interpretation is consistent with Rule 31 and does not give undue emphasis to Appendix B. To the extent that *Team Design v. Gottlieb* suggests otherwise, it is overruled.

FN5. Tennessee Rule of Civil Procedure 58 provides, in pertinent part, as follows:
Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge and all parties or counsel, or

(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

B. Tennessee Uniform Arbitration Act

[6] [7] Having determined that the parties' consent order was not governed by Rule 31, we turn to Mother's contention *269 that the TUAA applies to the consent order in this case. In Tennessee, parties may agree to binding arbitration of their disputes even after legal proceedings have been commenced, as long as the substance of their dispute is properly

amenable to binding arbitration and does not require adjudication by a court. In such circumstances, the arbitration proceeding is not governed by Tennessee Supreme Court Rule 31 and instead is governed by the TUAA. *See* Tenn. Code Ann. §§ 29-5-301 to -320. The TUAA provides that

(a) A written agreement to submit any existing controversy to arbitration ... is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract....

(b) The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this part and to enter judgment on an award thereunder.

Tenn. Code Ann. § 29-5-302. We have held that "[a] judgment by consent is in substance a contract of record made by the parties and approved by the court." *Third Nat. Bank v. Scribner,* 212 Tenn. 400, 370 S.W.2d 482, 486 (1963). We therefore conclude that Mother and Father's agreement to arbitrate embodied in the consent order falls within the scope of the TUAA. *See Pugh's Lawn Landscape, Co. v. Jaycon Dev. Corp.,* 320 S.W.3d 252, 256 (Tenn.2010).

[8] The grounds on which a trial court may vacate, modify, or correct an arbitration award under the TUAA are limited. *See* Tenn. Code Ann. §§ 29-5-312 to -314; [FN6] *270 *see also Pugh's,* 320 S.W.3d at 258 & n. 5; *Arnold v. Morgan Keegan & Co., Inc.,* 914 S.W.2d 445, 448 (Tenn.1996).

FN6. Three statutes describe the judicial review that a court must apply when asked to enforce an arbitration award pursuant to the TUAA. First, "the court shall confirm an award, unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 29-5-313 and 29-5-314." Tenn.Code Ann. § 29-5-312. Second, "the court shall vacate an award" when:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

Tenn.Code Ann. § 29-5-313(a)-(b). Third, "the court shall modify or correct the award" if an application is "made within ninety (90) days after delivery of a copy of the award to the applicant," and

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award. Tenn.Code Ann. § 29-5-314.

[9] The scope of the trial court's review as included in the consent order is much broader than the trial court's review under the TUAA. Specifically, the consent order states that "[i]n the event of an appeal, the decision of the arbitrator shall be binding pending the resolution of the matter by the Trial

Court, and said decision shall carry with it a presumption of correctness." Thus, it appears that Mother and Father attempted to enter into binding arbitration while preserving their right to appeal to the trial court and expanding the trial court's scope of judicial review.

We faced a similar situation in *Pugh's Lawn Landscape Co. v. Jaycon Development Corp.*, 320 S.W.3d at 255. In *Pugh's*, as in this case, the parties agreed to arbitrate their dispute by entering into a consent order that provided for a broader scope of judicial review than is contemplated under the TUAA. We take this opportunity to reaffirm our holding in *Pugh's* that the judicial review of an arbitrator's award is confined to the grounds enumerated in the TUAA. *Id.* at 254. We therefore invalidate the provision in the consent order embodying the agreement to arbitrate that purports to expand the trial court's scope of judicial review.

[10] Having held that a provision in the agreement to arbitrate is invalid, we now must determine whether to reform or rescind the agreement to arbitrate. If we reform the agreement, our review would occur pursuant to the narrow review provisions of the TUAA. If we rescind the agreement, we would remand the case to the trial court to adjudicate the

merits of the parties' dispute. Applying traditional contract principles in *Pugh's*, we rescinded the agreement on the basis that the provision authorizing expanded judicial review was material to the parties' agreement and that its failure constituted a mutual mistake that was sufficient to defeat the contract. *Id.* at 255. Our analysis in *Pugh's* applies with equal force in this case. As we explained, a consent order cannot be set aside unless entered through fraud or mistake.... [A] "mistake" exists in a legal sense when a person, acting on an erroneous conviction of law or fact, executes an instrument that he or she would not have executed but for the erroneous conviction. A court may not rescind a contract for mistake unless the mistake is innocent, mutual, and material to the transaction and unless the complainant shows an injury. *Id.* at 261 (citations omitted).

It is clear from the language of the consent order in this case that both parties agreed in good faith to preserve their right to appeal to the trial court and to expand the trial court's scope of judicial review. Thus, the mistake was mutual and innocent. Unlike the consent order in *Pugh's*, however, the consent order in this case does not describe the provision for judicial review as material consideration for the agreement to arbitrate. Nonetheless, the provision

for expanded judicial review embodies a basic assumption on which the agreement to arbitrate was based and as such is material. *See* *271 Restatement (Second) of Contracts § 152(1) (1981). [FN7] Likewise, the complainant, Father, has shown an injury in that his right to appeal is substantially limited by the failure of the consent order's judicial review provision. We therefore rescind the parties' agreement and hold that the failure of the judicial review provision in the parties' consent order renders their agreement to arbitrate invalid.

FN7. The Restatement (Second) of Contracts § 152(1) provides that [w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he [or she] bears the risk of the mistake under the rule stated in § 154 [When a Party Bears the Risk of a Mistake].

C. Arbitration of Parenting Issues

Although the above analysis is dispositive of the present appeal, we recognize that our holding will necessitate additional proceedings on remand. In the interest of judicial economy and in the exercise of our supervisory role, we take this opportunity to address the question on which we requested briefing and argument when granting Mother's application for permission to appeal: whether Tennessee law permits parties to submit to arbitration issues that implicate the trial court's duty to ensure that the best interests of children are protected. This issue presents a question of law, which we review de novo. *See In re Sidney J.*, 313 S.W.3d 772, 774 (Tenn.2010).

Tennessee statutes, taken together, impose a duty on trial courts to protect the best interests of children. The general custody provisions provide that "the court may ... award the care, custody and control of ... children ... as the welfare and interest of the ... children may demand" and that "the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(1), (a)(2)(A)(i) (2005 & Supp.2009). Furthermore, "in any ... proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be

made on the basis of the best interest of the child." Tenn. Code Ann. § 36-6-106(a) (Supp.2009). With respect to parenting plans, like the one at issue in this case, the General Assembly has stated that "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." Tenn. Code Ann. § 36-6-401(a) (2005).[FN8]

FN8. Other provisions implicate the trial court's duty to ensure that the best interests of children are protected. *See e.g.*, Tenn. Code Ann. § 36-1-101(a)(3) (2005) (stating that one purpose of Tennessee's adoption statutes is to ensure that "the best interests of children in the adoptive process are protected"); Tenn. Code Ann. § 36-6-306(c) (2005 & Supp.2009) (stating that after a determination of substantial harm has been made, "the court shall then determine whether grandparent visitation would be in the best interests of the child").

This statutory duty comports with the longstanding notion that the state stands in *parens patriae* of the minor children within its borders. As early as 1918, this Court stated, in the context of habeas corpus proceedings, that the state has a right "paramount to any parental or other claim, to dispose of such children as their best interests require. The legal

rights of a parent are very gravely considered, but are not enforced to the disadvantage of the child." *State v. West*, 139 Tenn. 522, 201 S.W. 743, 744 (1918).

Nonetheless, relying on our decision in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn.1993), Mother argues that, absent a showing*272 of substantial harm, divorced parents have a fundamental right to submit disputes concerning children to final and binding arbitration. Mother's reliance on *Hawk* is misplaced. Although we held in *Hawk* that the state lacks justification to interfere with the fundamental rights of parents in an intact marriage to raise their children absent a showing of harm to the child, *id.*, at 582, we also held that harm to a child is implicit in a divorce proceeding. *Id.* at 580; *see* Tenn. Code Ann. § 36-6-401(a) (recognizing "the detrimental effect of divorce on many children."); *Lee v. Lee*, 66 S.W.3d 837, 847 (Tenn.Ct.App.2001) (identifying divorce as "one circumstance that 'invites, and indeed requires, governmental intervention' into the parents' constitutionally protected fundamental liberty interest in the care and custody of their children").

[11] Contrary to Mother's argument, there is nothing in Tennessee's statutes or the law of this Court to support the conclusion that by agreeing to arbitrate,

parties may relieve the trial court of its duty to ensure that disputes between parents are resolved in the best interests of the children. Rather, it is well established that parents cannot bind the court with an agreement affecting the best interest of their children. We held in *Berryhill v. Rhodes*, for example, that parents may not enter into private agreements that circumvent statutory child-support obligations. 21 S.W.3d 188, 192 (Tenn.2000). It follows that parents cannot bind the court by submitting child-related issues to an arbitrator. *See Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793, 798 (1982) (" 'Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration.' ") (quoting *Kovacs v. Kovacs*, 98 Md.App. 289, 633 A.2d 425, 431 (1993)); *Kelm v. Kelm*, 92 Ohio St.3d 223, 749 N.E.2d 299, 303 (2001) ("[I]f parents cannot bind the court by an agreement affecting the interests of their children, they cannot bind the court by agreeing to let someone else, an arbitrator, make such a decision for them.").

Furthermore, as we explained in *Pugh's*, the limited review procedures that accompany binding arbitration are justified by the need to promote finality of arbitration awards. *Pugh's*, 320 S.W.3d at 257. Although an important factor, the need to pro-

mote finality is not the prevailing concern in resolving child-related matters. Rather, the prevailing concern is ensuring that the best interests of the child are protected. *See* Tenn.Code Ann. § 36-6-106(a); *Kendrick v. Shoemake,* 90 S.W.3d 566, 570 (Tenn.2002) (holding that child custody awards are always subject to modification to ensure that the best interests of the child are protected).

[12] We therefore hold that parties may not submit parenting issues to binding arbitration.[FN9] Parties may submit such disputes to non-binding arbitration. If the parties agree with the result produced, the parties must submit the agreement to the *273 trial court for a determination of the children's best interests.

FN9. Other jurisdictions have held that binding arbitration of parenting issues deprives courts of their obligation to ensure that those issues are resolved in the best interests of the children. *Nashid v. Andrawis,* 83 Conn.App. 115, 847 A.2d 1098, 1102 (2004) (concluding that the submission of child-related matters to an attorney for binding arbitration was an improper delegation of judicial authority and plain error); *Toiberman v. Tisera,* 998 So.2d 4, 9 (Fla.Dist.Ct.App.2008) (reversing the trial court's

delegation of its judicial authority to an arbitrator to decide matters relating to child custody, visitation, or child support as mandated by Florida statute); *Glauber v. Glauber*, 192 A.D.2d 94, 600 N.Y.S.2d 740, 743 (N.Y.App.Div.1993) ("The court's traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards."); *Crutchley*, 293 S.E.2d at 798; *Kelm*, 749 N.E.2d at 301-03.

III. Conclusion

For the reasons articulated above, we hold that the provision in the parties' consent order authorizing judicial review is invalid and that its invalidity is a mutual mistake justifying rescission of the parties' agreement to arbitrate. We further hold that parenting issues may not be submitted to binding arbitration in Tennessee. If the parties reach an agreement concerning parenting issues through the use of non-binding arbitration under Rule 31, such agreement must be submitted to the trial court for a determination of the children's best interests. We therefore reverse the judgment of the Court of Appeals, vacate the judgment of the trial court, and remand the case to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed equally between the

appellant, Elizabeth Sams Tuetken, and the appellee, Lance Edward Tuetken, for which execution may issue if necessary.

Supreme Court of Tennessee, at Jackson

Elizabeth Sams TUETKEN
v.
Lance Edward TUETKEN
No. W2008-00274-SC-R11-CV

ORDER

On December 14, 2009, this Court granted Elizabeth Sams Tuetken's application for permission to appeal. On January 14, 2010, Ms. Tuetken filed her supplemental brief pursuant to Tennessee Rules of Appellate Procedure 11(f). Upon due consideration, we conclude that additional briefing addressing the following issue will aid this Court's consideration of this appeal:

Whether binding arbitration of child custody disputes is consistent with Tennessee statutes requiring trial judges to resolve custody issues in the best interests of children. See Harvey v. Harvey, 680 N.W.2d 835 (Mich.2004); Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009); Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001); Elizabeth A. Jenkins, Annotation, Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters, 38 A.L.R.5th 69 (1996).

Appellant, Ms. Tuetken, shall file a second supplemental brief addressing this additional issue no later than February 15, 2010. No later than March 17, 2010, the Appellee, Mr. Lance Edward Tuetken, shall file a single brief in response to Appellant's first and second supplemental briefs. Should Ms. Tuetken elect to submit a reply brief, it shall be filed no later than March 31, 2010.

It is so ORDERED.

PER CURIAM

Court of Appeals of Tennessee.

Elizabeth Sams TUETKEN
v.
Lance Edward TUETKEN.

No. W2008-00274-COA-R3-CV.
April 22, 2009 Session.
Aug. 5, 2009.
Application for Permission to Appeal
Granted by Supreme Court
Dec. 14, 2009.

Direct Appeal from the Circuit Court for Shelby County, No. CT-001573-01; Donna M. Fields, Judge. Rachael Emily Putnam, Kay Farese Turner, Memphis, Tennessee, for the Appellant, Elizabeth Sams Tuetken.

Mitchell D. Moskovitz, Adam N. Cohen, Memphis, Tennessee, for the Appellee, Lance Edward Tuetken.

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and DAVID R. FARMER, J., joined.

OPINION

J. STEVEN STAFFORD, J.

*1 This appeal involves the trial court's decision to modify an arbitrator's award in a dispute concerning the parties' parenting plan and their child support obligations. Appellant contends that the trial court erred because modification of the arbitrator's award was not permissible under the Uniform Arbitration Act. We have reviewed the trial court's order referring this dispute to the arbitrator and concluded that the Uniform Arbitration Act is inapplicable. Instead, we find that this was a non-binding dispute resolution proceeding governed by Tennessee Supreme Court Rule 31. Accordingly, we affirm the trial court's decision to modify the arbitrator's award.

Background

Appellant Elizabeth Sams Tuetken ("Mother") and Appellee Lance Edward Tuetken ("Father") were divorced by decree of the Shelby County Circuit Court in 2003. The decree incorporated a parenting plan addressing issues related to the parties' two children. Under the plan, Father was required to pay child support to Mother.

In 2004, Mother and Father both filed motions in the trial court alleging civil contempt by the other parent. Mother's motion also included a request that the trial court modify the permanent parenting plan and the final decree of divorce. On June 28, 2006, the court entered a consent order appointing "S. Denise McCrary, Attorney at Law and Rule 31 Mediator," as the "Parenting Arbitrator." The order reserved determination of the contempt motions for the court but sent issues relating to the parenting plan and child support to the Parenting Arbitrator. The order contained the following provisions:

5. Should there be no timely challenge to the order of the Parenting Arbitrator, then the Parenting Arbitrator shall cause his or her order to be signed by the Court.

6. In the event of an appeal, the decision of the arbitrator shall be binding on the parties pending the resolution of the matter by the Trial Court, and said decision shall carry with it a presumption of correctness.

The record does not contain evidence from the arbitration hearing, but on August 10, 2006, the arbitrator submitted her final findings and conclusions.

Father filed a motion in the trial court objecting to the Parenting Arbitrator's findings and conclusions. Mother contended, both at trial and on appeal, that the trial court could not consider Father's objections because the Parenting Arbitrator's ruling was intended to be final and binding. The trial court disagreed and considered Father's objections. For purposes of this appeal, we do not consider the factual circumstances surrounding the adjustment to the child support and parenting plan. Instead, we only consider whether the trial court was authorized to modify the Parenting Arbitrator's award.

Mother appeals and raises three issues, as stated in her brief, for review:

1. Did the Trial Court err in ruling that it was not prohibited from modifying the Ruling of the Arbitrator with regard to the issues raised by [Father] in his Notice of Objections to the Ruling of the Arbitrator pursuant to the Uniform Arbitration Act?

2. Did the Trial Court err in modifying the Findings and Conclusions of the Parenting Arbitrator?

3. Did the Trial Court err in ordering that an evidentiary hearing be conducted on all remaining issues raised by [Father] in his Notice of Objections to the Ruling of the Arbitrator?

Law and Analysis

Before addressing Mother's substantive issues, we must first determine whether Tennessee Supreme Court Rule 31 ("Rule 31") or the Uniform Arbitration Act ("UAA"), Tenn.Code Ann. §§ 29-5-301-320, applies. Mother argues that the parties agreed to submit the matter to binding arbitration under the UAA. Father asserts that they only agreed to non-binding arbitration under Rule 31.

The UAA, as adopted by Tennessee, governs private agreements to submit a dispute to arbitration. Specifically, the UAA provides:

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract....

(b) The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this part and to enter judgment on an award thereunder.

Tenn.Code Ann. § 29-5-302. When the UAA applies, judicial review of an arbitrator's award is limited. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445,

Father filed a motion in the trial court objecting to the Parenting Arbitrator's findings and conclusions. Mother contended, both at trial and on appeal, that the trial court could not consider Father's objections because the Parenting Arbitrator's ruling was intended to be final and binding. The trial court disagreed and considered Father's objections. For purposes of this appeal, we do not consider the factual circumstances surrounding the adjustment to the child support and parenting plan. Instead, we only consider whether the trial court was authorized to modify the Parenting Arbitrator's award.

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2. Did the Trial Court err in modifying the Findings and Conclusions of the Parenting Arbitrator?

3. Did the Trial Court err in ordering that an evidentiary hearing be conducted on all remaining issues raised by [Father] in his Notice of Objections to the Ruling of the Arbitrator?

448 (Tenn.1996). The statute lists the specific and limited circumstances under which a court may modify or vacate an arbitrator's award. Tenn.Code Ann. §§ 29-5-310, 313. Mother contends that the UAA governs and that the statutory circumstances for modification of an award do not apply. Accordingly, she argues that the trial court lacked the authority to modify the Parenting Arbitrator's award.

Rule 31, on the other hand, sets forth procedures for court-annexed alternative dispute resolution in Tennessee's trial courts. These procedures "do not affect or address the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31." Tenn. Sup.Ct. R. 31, § 1. Unlike arbitration under the UAA, Rule 31 procedures "were intended to be alternatives, not replacements, to traditional litigation." *Team Design v. Gottlieb,* 104 S.W.3d 512, 519 (Tenn.Ct.App.2002). Furthermore, these methods "were not intended to require the parties to relinquish their decision-making right to any third party who would make their decision for them." *Id.*

Rule 31 methods of dispute resolution are initiated by the entry of an Order of Reference by the trial court. Tenn. Sup.Ct. R. 31, § 3(a). The court, with or without the parties' consent, may order the parties to participate in a Rule 31 judicial settlement conference, mediation, or case evaluation. Tenn.

Sup.Ct. R. 31, § 3(b). With the parties' consent, the court may also "order the parties to participate in Non-Binding Arbitration, Mini-Trial, Summary Jury Trial, or other appropriate alternative dispute resolution proceedings." Tenn. Sup.Ct. R. 31, § 3(d). Father argues that the trial court's order referred the parties to non-binding arbitration pursuant to Tenn. Sup.Ct. R. 31, § 21. Consequently, he contends that the parties reserved their right to be heard by the trial court and that the trial court retained the authority to modify, vacate, or disregard the arbitrator's award.

*3 The consent order entered by the trial court in this case does not mention either Rule 31 or the UAA. It refers to a "Parenting Arbitrator" but does not specify whether the arbitration is binding or non-binding. To support her argument that the arbitration was binding under the UAA, Mother relies on the following provision: "In the event of an appeal, the decision of the arbitrator shall be binding on the parties pending the resolution of the matter by the Trial Court, and said decision shall carry with it a presumption of correctness." Furthermore, both parties initialed a provision stating that "I understand that the orders of the Parenting Arbitrator can be reviewed by the Court but that an objection must be made within the time specified in this stipulation." Mother contends that these

provisions show that the parties agreed to submit the matter to binding arbitration under the UAA.

In this case, the dispute resolution proceeding was initiated by a court order rather than by a private agreement between the parties. This Court previously stated in *Adams v. City of Lebanon*, M2001-00662-COA-R3-CV, 2002 WL 192575 (Tenn.Ct.App. Feb.7, 2002):

Rule 31 applies to court ordered mediation, which may be ordered by the court on its own motion, or on motion of a party. To be so ordered, there must therefore be an underlying matter before the court. The rule expressly does not govern private alternative dispute resolution. *Id.*, at *5 (internal citations omitted); *see also, Harris v. Hall*, M2000-00784-COA-R3-CV, 2001 WL 1504893, at *4 (Tenn.Ct.App. Nov.28, 2001) (finding that Rule 31 applies when the order referring the matter to mediation "was entered by a court in the context of ongoing litigation and since the dispute resolution was attempted by a judicial officer...."). Following *Adams* and *Harris*, we find that a court-ordered dispute resolution proceeding is governed by Rule 31 unless the UAA is expressly involved. Here, the trial court's order was entered in the context of ongoing litigation, and it referred the matter to a Rule 31 Mediator to act as the "Parenting Arbitrator." The

Sup.Ct. R. 31, § 3(b). With the parties' consent, the court may also "order the parties to participate in Non-Binding Arbitration, Mini-Trial, Summary Jury Trial, or other appropriate alternative dispute resolution proceedings." Tenn. Sup.Ct. R. 31, § 3(d). Father argues that the trial court's order referred the parties to non-binding arbitration pursuant to Tenn. Sup.Ct. R. 31, § 21. Consequently, he contends that the parties reserved their right to be heard by the trial court and that the trial court retained the authority to modify, vacate, or disregard the arbitrator's award.

*3 The consent order entered by the trial court in this case does not mention either Rule 31 or the UAA. It refers to a "Parenting Arbitrator" but does not specify whether the arbitration is binding or non-binding. To support her argument that the arbitration was binding under the UAA, Mother relies on the following provision: "In the event of an appeal, the decision of the arbitrator shall be binding on the parties pending the resolution of the matter by the Trial Court, and said decision shall carry with it a presumption of correctness." Furthermore, both parties initialed a provision stating that "I understand that the orders of the Parenting Arbitrator can be reviewed by the Court but that an objection must be made within the time specified in this stipulation." Mother contends that these

court's order, however, did not expressly provide that the UAA would govern. Accordingly, the matter before the Parenting Arbitrator was a court-annexed proceeding subject to Rule 31.

Although Rule 31 proceedings are typically non-binding, the court, in *Gottlieb,* discussed the possibility that parties could agree to make the outcome of a Rule 31 proceeding final and binding. *Gottlieb,* 104 S.W.3d at 528. Under Tenn. Sup.Ct. R. 31, Appendix B, ¶ 15, for example, parties are permitted to agree that an arbitrator's award in a "non-binding arbitration" proceeding will be "final and binding." *Id.* at 528. To do so, however, the parties must stipulate "in writing that the award shall be final and binding." Tenn. Sup.Ct. R. 31, Appendix B, ¶ 15. In *Gottlieb,* the court further explained the manner in which parties can agree to make the result of a Rule 31 proceeding final and binding:

*4 To assure that a waiver of the fundamental right of access to the courts is knowing, voluntary, and intelligent, the record must demonstrate, at a minimum, that parties agreeing to make the outcome of a Tenn. S.Ct. R. 31 alternative dispute resolution procedure final and binding know and understand: (1) that they have a right to insist that the Tenn. S.Ct. R. 31 proceeding be non-binding, (2) that they have a right to a judicial remedy if the Tenn. S.Ct. R. 31 proceeding is unsuccessful, (3) that they may reject the outcome of a non-binding Tenn. S.Ct. R. 31 proceeding without fear of reprisal, (4) that they understand that by agreeing to make the outcome of the proceeding final and binding they are waiving

their right to have their dispute adjudicated by a court and that they are limiting their right to have the outcome of the proceeding reviewed by a court, (5) that they have consulted with their lawyers in making the decision whether or not to waive the right of access to the courts or their rights under Tenn. S.Ct. R. 31 and that their lawyers have fully advised them of the advantages and disadvantages of waiving their rights, and (6) that they voluntarily and personally waive these rights. *Gottlieb*, 104 S.W.3d at 529. If these requirements are not met, the outcome of a Rule 31 proceeding will be considered non-binding. This record contains no indication that the requirements listed in *Gottlieb* have been satisfied.

The consent order entered by the trial court only provided that the Parenting Arbitrator's decision would be binding until the trial court conducted its own review. Without more, we cannot find that the parties satisfied the conditions necessary to make the award final and binding. Consequently, we find that the parties submitted this matter to a non-binding dispute resolution proceeding under Rule 31. Father was therefore entitled to challenge the outcome of the proceeding in the trial court, and the trial court was authorized to modify the Parenting Arbitrator's award as it deemed necessary.

The decision of the trial court is therefore affirmed. Costs are assessed to Appellant, Elizabeth Sams Tuetken.

U.S.C.A. Const. Amend. XIV Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNIFORM ARBITRATION ACT

<Table of Jurisdictions Wherein Act Has Been Adopted>

<For text of Uniform Act, and notes on variations from official text and annotation materials for adopting jurisdictions, see Uniform Laws Annotated, Master Edition, Volume 7, Part IA.>

Jurisdiction	Laws	Effective Date	Statutory Citation
Alaska [FN1]	1968, c. 232	8-6-1968	AS 09.43.010 to 09.43.180.
Arizona	1982, c. 123	6-21-1982	A.R.S. §§ 12-1501 to 12-1518, 12-2010.
Arkansas	1969, No. 260		A.C.A. §§ 16-108-201 to 16-108-224.
Delaware	1972, c. 382	4-30-1972	10 Del.C. §§ 5701 to 5725.

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District of Columbia	D.C. Law 1-117	4-7-1977	D.C. Official Code, 2001 Ed. §§ 16-4301 to 16-4319.
[illegible]	[illegible]	[illegible]	[illegible]
Idaho	1975, c. 117	7-1-1975	I.C. §§ 7-901 to 7-922.
[illegible]	[illegible]	[illegible]	[illegible]
Indiana	1998, P.L. 1-1998	7-1-1998	West's A.I.C. 34-57-2-1 to 34-57-2-22.
Iowa	1981, c. 202	7-1-1981	I.C.A. §§ 679A.1 to 679A.19.

Kansas	1973, c. 24	7-1-1973	K.S.A. 5-401 to 5-422.
[redacted]			
Maine	1967, c. 430	10-7-1967	14 M.R.S.A. §§ 5927 to 5949.
[redacted]			
Massachusetts	1960, c. 374	12-31-1960	M.G.L.A. c. 251, §§ 1 to 19.
[redacted]			
Minnesota	1957, c. 633	4-25-1957	M.S.A. §§ 572.08 to 572.30.

Montana	1985, c. 684		MCA 27-5-111 to 27-5-324.

Pennsylvania	1980, P.L. 142	12-4-1980	42 Pa.C.S.A. §§ 7301 to 7320.

South Dakota	1971, c. 157	7-1-1971	SDCL 21-25A-1 to 21-25A-38.
Tennessee	1983, c. 462	5-26-1983	T.C.A. §§ 29-5-301 to 29-5-320.

Texas	1965, c. 689	1-1-1966	V.T.C.A., Civil Practice & Remedies Code §§ 171.001 to 171.098.
Virginia	1986, c. 614		Code 1950, §§ 8.01-581.01 to 8.01-581.016.
Wyoming	1959, c. 115	2-19-1959	Wyo.Stat.Ann. §§ 1-36-101 to 1-36-119.

[FN1] Adopted the Uniform Arbitration Act (2000) without repealing the Uniform Arbitration Act (1956).

Tennessee Code Annotated § 29-5-301

(a) This part may be cited as the "Uniform Arbitration Act."

(b) As used in this part, "court" means any court of competent jurisdiction of the state.

Tennessee Code Annotated § 29-5-302

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.

The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this part and to enter judgment on an award thereunder.

Tennessee Code Annotated § 29-5-303

(a) On application § 29-5-302, and the opposing party's refusal to arbitrate, the counsel shall order the parties to proceed with arbitration but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

(b) On application the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a), the application shall be made therein. Otherwise and subject to § 29-5-318, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefore has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Tennessee Code Annotated § 29-5-304

If the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed

method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Tennessee Code Annotated § 29-5-305

The powers of arbitration may be exercised by a majority unless otherwise provided by the agreement or by this part.

Tennessee Code Annotated §29-5-306

Unless otherwise provided by the agreement:

(1) The arbitrators shall appoint a time and place for the hearing and case notification to the parties to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and n request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the

date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced, notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

Tennessee Code Annotated § 29-5-307

A party has the right to be represented by an attorney at any proceeding or hearing under this part. A waiver thereof prior to the proceeding or hearing is ineffective.

Tennessee Code Annotated § 29-5-308

(a) The arbitrators may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and the arbitrators have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced in the matter provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the circuit court.

Tennessee Code Annotated § 29-5-309

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless that party notifies the arbitrators of such objection prior to the delivery of the award of the other party.

Tennessee Code Annotated § 29-5-310

On application of a party or, if an application to the court is pending under § 29-5-312, § 29-5-313, or § 29-5-314, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in § 29-5-314(a)(1) and (3), or for the purpose of clarifying the award. The application shall be made within twenty (20) days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating such party must serve objections thereto, if any, within ten (10) days from the notice. The award so modified or corrected is subject to the provisions of §§29-5-312, 29-5-313 and 29-5-314.

Tennessee Code Annotated § 29-5-311

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

Tennessee Code Annotated § 29-5-312

Upon application of a party, the court shall confirm an award, unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§29-5-313 and 29-5-314.

Tennessee Code Annotated §29-5-313

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) The award was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their power;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(c) In vacating the award on ground other than stated in subdivision (a)(5), the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with § 29-5-304, or if the award

is vacated on grounds set forth in subdivisions (a)(3) and (4), the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 29-5-304. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

Tennessee Code Annotated § 29-5-314

(a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

Tennessee Code Annotated § 29-5-315

Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application, and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

Tennessee Code Annotated § 29-5-316

(a) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying, or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

Tennessee Code Annotated § 29-5-317

Except as otherwise provided, an application to the court under this part shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

Tennessee Code Annotated§ 29-5-318

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business or, if the adverse party has no residence or place of business in this state, to the court of any county. All subsequent applications

shall be made to the court hearing the initial application unless the court otherwise directs.

Tennessee Code Annotated § 29-5-319

(a) An appeal may be taken from :

(1) An order denying an application to compel arbitration made under § 29-5-303;

(2) An order granting an application to stay arbitration made under § 29-5-303(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a re-hearing; and

(6) A judgment or decree entered pursuant to the provisions of this part.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Tennessee Code Annotated §29-5-320

This part shall be so construed as to effectuate its

general purpose to make uniform the law of those states which enact it.

Tennessee Code Annotated§36-6-101

(a)(1) In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children is a question, the court may, notwithstanding a decree for annulment, divorce or separate maintenance is denied, award the care, custody and control of such child or children to either of the parties to the suit or to both parties in the instance of joint custody or shared parenting, or to some suitable person, as the welfare and interest of the child or children may demand, and the court may decree that suitable support be made by the natural parents or those who stand in the place of the natural parents by adoption. Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.

(2)(A)(i) Except as provided in this subdivision (a)(2)(A), neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by clear and

convincing evidence to the contrary, there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of joint custody at a subsequent proceeding shall be by a preponderance of the evidence.

(ii) Unless the court finds by clear and convincing evidence to the contrary, there is a presumption that custody shall not be awarded to a parent who has been convicted of a criminal offense under title 39, chapter 13, part 5, against a child less than eighteen (18) years of age.

(iii) The provisions of subdivision (a)(2)(A)(ii) shall apply only to persons who are convicted on or after July 1, 2006. Subdivision (a)(2)(A)(ii) and this subdivision (a)(2)(A)(iii) shall not be construed to prevent a parent from being granted visitation with the child; provided, however, that any visitation shall be supervised.

(iv) If it is determined by the court, based upon a prior order or reliable evidence, that a parent has willfully abandoned a child for a period of eighteen (18) months, as the term is used in § 36-6-406(a)(1), then, unless the court finds by clear and convincing evidence to the contrary, the abandoning parent's residential time, as provided in the permanent or temporary parenting plan or other court order, shall be limited. This subdivision (a)(2)(A)(iv) shall not be construed to prevent such a parent from being granted limited visitation with the child. Nothing in this subdivision (a)(2)(A)(iv) shall be construed to apply to children in the legal custody of the department of children's services.

(B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

(ii) Nothing contained within the provisions of this subdivision (a)(2) shall interfere with the requirement that parties to an action for legal separation, annulment, absolute divorce or separate maintenance incorporate a parenting plan into the final decree or decree modifying an existing custody order.

(iii) Nothing in this subsection (a) shall imply a mandatory modification to the child support order.

(C) If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working

condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

(3) Except when the court finds it not to be in the best interests of the affected child, each order pertaining to the custody or possession of a child arising from an action for absolute divorce, divorce from bed and board or annulment shall grant to each parent the rights listed in subdivisions (a)(3)(A)(i)-(vi) during periods when the child is not in that parent's possession or shall incorporate such rights by reference to a prior order. Other orders pertaining to custody or possession of a child may contain the rights listed in subdivisions (a)(3)(A)(i)-(vi).

(A) The referenced rights are as follows:

(i) The right to unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations;

(ii) The right to send mail to the child that the other parent shall not open or censor;

(iii) The right to receive notice and relevant information as soon as practicable but within twenty-

four (24) hours of any event of hospitalization, major illness or death of the child;

(iv) The right to receive directly from the child's school records, names of teachers, class schedules, standardized test scores, and any other records customarily made available to parents, upon written request that includes a current mailing address and upon payment of reasonable costs of duplicating;

(v) Unless otherwise provided by law, the right to receive copies of the child's medical, health or other treatment records directly from the physician or health care provider who provided such treatment or health care upon written request that contains a current mailing address and upon payment of reasonable costs of duplication; provided, that no person who receives the mailing address of a parent as a result of this requirement shall provide such address to the other parent or a third person;

(vi) The right to be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child;

(vii) The right to be given at least forty-eight (48) hours notice, whenever possible, of all extra-

(curricular activities, and the opportunity to participate or observe, including, but not limited to, the following:

(a) School activities;

(b) Athletic activities;

(c)Church activities; and

(d) Other activities as to which parental participation or observation would be appropriate;

(viii) The right to receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two (2) days, an itinerary including telephone numbers for use in the event of an emergency; and

(ix) The right of access and participation in education, including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents, provided the participation or access is reasonable and does not interfere with day-to-day operations or with the child's educational performance.

(B) Any of the foregoing rights may be denied in

whole or in part to one or both parents by the court upon a showing that such denial is in the best interests of the child. Nothing herein shall be construed to prohibit the court from ordering additional rights where the facts and circumstances so require.

(4) Notwithstanding any common law presumption to the contrary, a finding under § 36-6-106(8), that child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, has occurred within the family shall give rise to a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to award sole custody, joint legal or joint physical custody to the perpetrator of such abuse.

(b) Notwithstanding any provision of this section to the contrary, the party, or parties, or other person awarded custody and control of such child or children shall be entitled to enforce the provisions of the court's decree concerning the suitable support of such child or children in the appropriate court of any county in this state in which such child or children reside; provided, that such court shall have divorce jurisdiction, if service of process is effectuated upon the obligor within this state. Jurisdiction to modify or alter such decree shall remain in the exclusive control of the court that issued such decree.

(c) Nothing in this chapter shall be construed to alter, modify or restrict the exclusive jurisdiction of the juvenile court pursuant to § 37-1-103.

(d) It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party.

(e)(1) In an action for dissolution of marriage involving minor children, or in a post-judgment proceeding involving minor children, if the court finds, on a case by case basis, that it would be in the best interest of the minor children, the court may on its own motion, or on the motion of either party, order the parties, excluding the minor children, to attend an educational seminar concerning the effects of the dissolution of marriage on the children. The program may be divided into sessions, which in the aggregate shall not exceed four (4) hours in duration. The program shall be educational in nature and not designed for individual therapy.

(2) The fees or costs of the educational sessions under this section, which shall be reasonable, shall be borne by the parties and may be assessed by the

court as it deems equitable. Fees may be waived upon motion for indigent persons.

(4) No court shall deny the granting of a divorce from the bonds of matrimony for failure of a party or both parties to attend the educational session. Refusal to attend the educational session may be punished by contempt and may be considered by the court as evidence of the parent's lack of good faith in proceedings under part 4 of this chapter.

Tennessee Code Annotated§ 36-6-106

(a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. The court shall consider all relevant factors, including the following, where applicable:

(1) The love, affection and emotional ties existing between the parents or caregivers and the child;

(2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary

caregiver;

(3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents or caregivers;

(5) The mental and physical health of the parents or caregivers;

(6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child, if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those

of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

(10) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship

between the child and both of the child's parents, consistent with the best interest of the child.

(b) Notwithstanding the provisions of any law to the contrary, the court has jurisdiction to make an initial custody determination regarding a minor child or may modify a prior order of child custody upon finding that the custodial parent has been convicted of or found civilly liable for the intentional and wrongful death of the child's other parent or legal guardian.

(c) As used in this section, "caregiver" has the meaning ascribed to that term in § 37-5-501.

(d) Nothing in subsections (a) and (c) shall be construed to affect or diminish the constitutional rights of parents that may arise during and are inherent in custody proceedings.

Tennessee Code Annotated§ 36-6-401. Findings

(a) Parents have the responsibility to make decisions and perform other parental duties necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by

which the court determines and allocates the parties' parental responsibilities. The general assembly recognizes the detrimental effect of divorce on many children and that divorce, by its nature, means that neither parent will have the same access to the child as would have been possible had they been able to maintain an intact family. The general assembly finds the need for stability and consistency in children's lives. The general assembly also has an interest in educating parents concerning the impact of divorce on children. The general assembly recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care.

(b) The general assembly finds that mothers and fathers in families are the backbone of this state and this nation. They teach children right from wrong, respect for others, and the value of working hard to make a good life for themselves and for their future families. Most children do best when they receive the emotional and financial support of both parents. The general assembly finds that a different approach to dispute resolution in child custody and visitation matters is useful.

IN THE SUPREME COURT OF TENNESSEE

ELIZABETH SAMS TUETKEN
Plaintiff, Appellant

vs.

LANCE EDWARD TUETKEN
Defendant, Appellee

Appellate Docket No. W2008-00274-COA-R3-CV
Circuit Court of Shelby County # CT-001573-01

APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

Respectfully Submitted,

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(901) 529-4040

IN THE SUPREME COURT OF TENNESSEE

ELIZABETH SAMS TUETKEN
Plaintiff, Appellant

vs. Appellate Docket No. W2008-00274 COA-R3-CV
Circuit Court of Shelby County # CT-001573-01

LANCE EDWARD TUETKEN
Defendant, Appellee

APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

COMES NOW, the Appellant, ELIZABETH SAMS TUETKEN, by and through her attorneys of record Rachael E. Putnam and Kay Farese Turner, and respectfully submits to this Honorable Court this, her Application for Permission to Appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, and, in support thereof, would state the following, to wit:

A. *Date of Judgment:* August 5, 2009. No Petition for Rehearing Filed (attached as Exhibit 1 is the Judgment from the Court of Appeals.)

B. Questions Presented for Review:

1. **What is a "Parenting Arbitrator" and what body of law and rules of procedure govern the proceedings over which they preside?**

a. When parties to a divorce and/or post-divorce custody proceedings agree to submit all parenting disputes to a "Parenting Arbitrator" who will preside over all proceedings dealing with the care, custody, and control of the minor children, and act as a private judge for the parties, which body of law and rules of procedure govern the proceedings if the agreement does not specify:

i. The **Uniform Arbitration Act** as stated in T.C.A. §29-5-302;
ii. **Rule 31 §21** of the Supreme Court Rules defining **Non-Binding Arbitration proceedings**; or
iii. **Rule 53** of the Tennessee Rules of Civil Procedure defining the appointment and duties of **Special Masters**.

2. **Did the Appellate Court err in holding that the proceedings arising from the Consent Order Appointing Parenting Arbitrator were court-annexed proceedings subject to Rule 31 of the Tennessee Supreme Court Rule?**

C. *Statement of facts relevant to the questions presented:*

AGREEMENT OF THE PARTIES

- **The parties agreed** on June 28, 2006, to submit all issues relating to their minor children to a parenting arbitrator.

- **The parties' selected S. Denise McCrary**, an attorney whose practice is primarily focused in the area of family law, to serve as their parenting arbitrator.

- **The parties' memorialized their agreement** in the Consent Order Appointing Parenting Arbitrator. (attached as Exhibit 2)

- **The parties enumerated the issues** to be decided by the parenting arbitrator in the event of a dispute within the Consent Order Appointing Parenting Arbitrator.

- **The parties agreed upon the procedure** to challenge the findings of the parenting arbitrator.

- **The parties agreed to the standard of review** to be used by the trial Court in the event of an appeal. Specifically, the Arbitrators ruling was to be binding on the parties pending review with a

- **presumption of correctness.**

PROCEDURAL HISTORY

- On August 15, 2007, the Arbitrator submitted **Findings and Conclusions of Parenting Arbitrator**.

- On August 31, 2007, the Trial Court entered its **Order Incorporating August 15, 2007 Decision of the Parenting Arbitrator**. (attached as Exhibit 3 is the Order Incorporating August 15, 2007 Decision to which is attached the Findings and Conclusions of Parenting Arbitrator.)

- On August 28, 2007, Appellee filed his **Notice of Objections to the Ruling of the Arbitrator** pursuant to Rule 53.04(2) of the Tennessee Rules of Civil Procedure. (attached as Exhibit 4 is the Notice of Objections to the Ruling of the Arbitrator)

- On November 9, 2007, Appellee filed his **Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator**, pursuant to Rule 53.04(2). (attached as Exhibit 5 is a copy of the Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator.)

- On January 8, 2008, the Trial Court entered an **Order on Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator**. (attached as Exhibit 6 is a copy of the Order on Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator.)

- On October 8, 2008, the Appellant filed her **Brief of the Appellant**. (attached as Exhibit 7 is a copy of the Brief of the Appellant.

- In the first paragraph of the **Appellate Court Opinion**, it states:

> "We have reviewed the trial court's order referring this dispute to the arbitrator and conclude that the Uniform Arbitration Act is inapplicable. **Instead, we find that this was a non-binding dispute resolution proceeding governed by Tennessee Supreme Court Rule 31.**"

The record of the proceedings before the Trial Court does not support the Appellate Court's finding that the parties were engaged in a Rule 31 non-binding dispute resolution proceeding. The Appellate Court offers no explanation or analysis of how the facts of this case support their holding.

THE IMPOSSIBILITY OF RULE 31

The requirements of Supreme Court Rule 31 are clearly stated within the rule and are not met in the proceedings at issue. The Appellate Court states in its opinion that:

> "Father asserts that they only agreed to non-binding arbitration under Rule 31."

Appellee made no such assertion. Rather, the Appellee merely offered the type of non-binding arbitration set forth in Rule 31 as an example in support of his argument that many types of arbitration are available to a party depending upon what they agreed. **The Record of the Trial Court clearly reflects that the proceedings at issue were not conducted pursuant to Rule 31. Specifically, if the proceedings before the Trial Court were intended to be conducted pursuant to Rule 31, the following provisions were violated:**

1. §5. Reports: The Parenting Arbitrator filed detailed findings with the Trial Court regarding the hearings which she conducted and the evidence which was presented by both parties. Pursuant to Rule 31, the Arbitrator is only allowed to advise the Court of whether or not both parties participated in the process.

2. §7. Inadmissible Evidence: Detailed evidence of the proceedings was contained in the Findings of the Arbitrator which was filed with the Court. Pursuant to Rule 31, all such evidence is to be kept confidential and is non-admissible in the proceedings before the Trial Court.

3. §21. Non-Binding Arbitration: All provisions governing non-binding arbitration were violated in these proceedings by and through the disclosure to the Trial Court of all information regarding the proceedings conducted by the Arbitrator. If the Court of Appeals' Judgment is allowed to stand, the Trial Judge, upon remand, will have to be recused due to her having full knowledge of the proceedings before the Parenting Arbitrator.

Contrary to the erroneous findings of the Appellate Court, in Appellee's Notice of Objections to the Ruling of the Arbitrator and his Motion for Ruling on Notice of Objections filed in the Trial Court, he cites to **Rule 53. Masters** of the Tennessee Rules of Civil Procedure, not Supreme Court Rule 31, due to the Parenting Arbitrator acting in the capacity of a private judge or special master.

The conclusion that these parties submitted their parenting issues to Court annexed dispute resolution pursuant to Rule 31 of the Supreme Court Rules, is illogical and not based upon the clear language of intent in the parties' agreement, and therefore, constitutes reversible error on the part of the Court of Appeals.

D. Reasons supporting review:

The Court of Appeals' holding in the present case is inconsistent with prior holdings in factually similar cases. Specifically, three months prior to the Court of Appeals rendering it's opinion in this case, an opinion was issued by the Court of Appeals in the case of *Pugh's Landscaping Company, Inc. v. Jaycon Development Corporation*, 2009 WL 1099270 (Tenn.Ct.App.), which wholly contradicts the Court's holding in the present case. Judge Steven Stafford authored both of these decisions.

In the *Pugh's* case, like the present case, the arbitration agreement did not set forth whether the arbitration was binding or non-binding; nor, did it specifically state which statute or procedure would govern the arbitration proceedings. The Court, relying oddly enough upon the same case as it relied upon in the present opinion, *Team Design v. Gotlieb*,

104 S.W.3d 512, 517 (Tenn.Ct.App.2002), held that parties could agree on virtually any mutually satisfactory procedure that was not illegal or contrary to public policy. The Court continued its reasoning by stating that upon the parties requesting the Court's assistance in resolving the dispute, by and through a request that the Arbitrator's award be confirmed and/or a request for review of the award, the contours of the procedure narrows considerably and a determination of which statute and procedure govern the proceedings is required. The Court of Appeals in *Pugh's* went on to perform such analysis and examined first, the application of Tennessee's Uniform Arbitration Act as stated in Tennessee Code Annotated §29-5-301-320 (2000). Ultimately, the Court of Appeals held in *Pugh's*, that the parties had not sought mediation or non-binding arbitration as contemplated by the Tennessee Supreme Court Rule 31, but rather that both parties had wanted binding arbitration with expanded appellate review. The Court of Appeals cited a Michigan case in support of its holding that the provision for expanded appellate review does not make the arbitration any less binding. *Dick v. Dick*, 534 N.W.2d 185, 187-188 (Mich.Ct.App.1995)

The Court then continued to analyze how an arbitration agreement, which attempts to modify the

scope of review of an arbitrator's award by the Trial Court or the Court of Appeals, interplays with the Uniform Arbitration Act. The Court held pursuant to *Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W.2d 445, 450 (Tenn. 1996) that the review of an arbitrator's decision is "statutorily limited and any judicial review must be conducted within those limits." Due to the litigants attempt to modify the Court's standard of review and their failure in *Pugh's* to follow the procedure as set forth in the Uniform Arbitration Act to challenge an arbitrator's award, no relief or review could be achieved by the Appellant and the arbitrator's award must be confirmed.

In the present case, the parties agreed that the arbitrator's ruling would be binding on them pending review by the Trial Court, if requested, and that the ruling would carry with it a presumption of correctness. Additionally, the parties agreed to limit the amount of time in which either party had to challenge the arbitrator's ruling to ten (10) days. The Appellee, in the present case, just as in the *Pugh's* case, never filed a Motion to Vacate the Arbitrator's Findings nor did the objections filed by the Appellee fall into one of the allowable categories set forth in the Uniform Arbitration Act for setting aside, vacating or modifying the Arbitrator's Award. Despite the factual similarities which exist in the

present case and the *Pugh's* case which are significant, the Court of Appeals failed to issue a similar ruling. Appellant respectfully suggests to this Honorable Court, based upon the questions in the present case posed during the Oral Argument before the Court of Appeals, that the Court of Appeals erroneously concluded that a different analysis was appropriate based upon the fact that this case was a post divorce custody proceeding. Appellant avers that the same legal analysis performed by the Court of Appeals in the *Pugh's* case, and as set forth by this Supreme Court in *Arnold,* should have been applied in the present case regardless of the nature of the proceedings. As a result of the Court of Appeals failing to do so, the law is unclear and will continue to be inconsistently applied until this Court offers clarification.

CERTIFICATE OF SERVICE

I, Rachael Emily Putnam, do hereby certify that I have on this the 5th day of October, 2009 forwarded via U. S. Mail, postage prepaid, a true and correct copy of the foregoing Application for Permission to Appeal to Mitchell D. Moskovitz, Adam N. Cohen, Attorneys for Appellee, 530 Oak Court Drive, Suite355, Memphis, TN 38117.

IN THE SUPREME COURT OF TENNESSEE

ELIZABETH SAMS TUETKEN
Plaintiff, Appellant

v. Supreme Court Docket No.W200800274SCR11-CV
Appellate Docket No. W2008-00274-COA-R3-CV
Circuit Court of Shelby County No. CT-001573-01

LANCE EDWARD TUETKEN
Defendant, Appellee

SECOND SUPPLEMENTAL BRIEF OF THE APPELLANT, ELIZABETH SAMS TUETKEN

Respectfully Submitted,

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ORAL ARGUMENT REQUESTED

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ARGUMENT

Binding Arbitration of child custody disputes is not inconsistent with Tennessee statutes requiring trial judges to resolve custody issues in the best interests of children.

Pursuant to this Court's directive, Appellant examined the cases of Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004); Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009); Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001); and Elizabeth A. Jenkins, Annotation, Validity and Construction Provisions for Arbitration of Disputes as to Alimony or Support Payments of Child Visitation or Custody Matters, 38 A.L.R.5th 69 (1996). Appellant's review of the foregoing material, and the opposing conclusions reached by the Courts of the respective states led the Appellant to carefully examine the principles upon which Tennessee custody statutes are based and the constitutional limitations which must be considered in applying such statutes.

Appellant submits that the language of the applicable custody statutes found in §36-6-101 and §36-6-106 of the Tennessee Code Annotated, as well as, the Uniform Arbitration Act codified in §29-5-301 are clear and unambiguous. The application of these statutes, as they relate to one another, raises the

fundamental question of how to properly balance an individual's constitutional right to privacy, which includes the right to rear one's children without interference from the state, and the obligation of every state to protect children when such protection is necessary.

The question of when such protection is necessary is the crux of the issue before this Court. Appellant submits that when two parents, married or single, choose to submit their parenting disputes to an agreed upon arbitrator rather than having such disputes determined by a trial court, the state has no right to interfere or prohibit such choice, absent a finding by the trial court that a serious threat of harm exists to the child which requires the Court to act in *parens patriae*. Appellant submits that the belief that the State of Tennessee has an automatic right to interfere and control the resolution of custody disputes due to the belief that there is implicit harm occurring to children when their parents choose to no longer be in a relationship with one another is unconstitutional.

ANALYSIS OF APPLICABLE CASE LAW AND STATUTES

This Court has never addressed the issue of

whether parents involved in a suit for divorce, annulment, separation or any other action requiring a trial court to make a custody determination have the right to agree to submit such issues to arbitration rather than having a trial court decide such issues. In identifying the issues which are inherent to this question, it clear that this is the same issue which has arisen in the past when the State interferes and overrides the rights of parents to rear their children. Specifically, when is a parent's constitutional right to rear their children without state interference outweighed by the state's duty to protect children from harm?

Appellant found that this Court, however, has repeatedly addressed this issue over the past eighteen years incident to the evolution of the law governing grandparent's rights to visitation with their grandchildren. In 1993, this Court established in Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993), that both the United States Constitution and the Tennessee State Constitution protect and hold as sacrosanct, a parents' fundamental right to rear their children without interference from the state. Const. Art.1,§8 The rights of parents to care for their children as they see fit have been considered an inherent part of every citizen's fundamental right to life, liberty, privacy and the pursuit of happiness. U.S.C.A. Const.Amend. 14; Const. Art.1,§8.

In balancing these rights with the duty of the state to protect children from harm, this Court held in Hawk v. Hawk that a showing of substantial harm which threatens a child's welfare was required in order to give the state a sufficiently compelling justification for infringement on the fundamental right of parents to raise their children as they see fit. Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993) This Court went on to state in Hawk that without substantial danger of harm to a child, courts could not constitutionally impose its own subjective notions of best interests of a child *when intact, nuclear family with fit married parents is involved*. Id., 579 The Hawk Court found that there was a limitation of the protection afforded under the United States Constitution and the Tennessee State Constitution which was that only married parents were entitled to such rights, as the Hawk Court reasoned as follows:

"Implicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened before the state may intervene in parental decision-making. In a divorce case, for example, the harm from the discontinuity of the parent's relationship compels the court to determine child custody "as the welfare and interest of the child or children may demand..."T.C.A. §36-6-101 (1991)" Id., 580

The requirement of parties to be married in order to be protected from unwarranted state interference in the parenting of their children, which the Hawk opinion threatened to establish, was corrected over the course of the next three years by and through the opinions contained in Rust v. Rust, 864 S.W.2d 52, (Tenn.App.1993); Nale v. Robertson, 871 S.W.2d 674, (Tenn. 1994); Simmons v. Simmons, 900 S.W.2d 682, (Tenn. 1995); Floyd v. McNeely, 1995 WL 390954 (Tenn.Ct.App. 1995); McVay v. Blen, 1996 WL 729911 (Tenn.Ct.App. 1996). In Rust, the Court of Appeals extended the rights of parents to rear children without unwarranted state interference to the single family unit which is established following a divorce. In Nale, this Court held that parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children under both the United States and Tennessee Constitution and found the assertion that the Hawk opinion limited these fundamental rights to "an intact nuclear family with fit parents" to be untenable. In Simmons, this Court established that a parent's fundamental rights to liberty and privacy in rearing their children exists even when one of the biological parent's rights have been terminated and the other parent has remarried and their new spouse has adopted the child. The

Appellate Court in Floyd, held that the rights afforded to the parents in Hawk extended equally to the mother of the minor children despite the death of the children's father and the subsequent remarriage of the mother, specifically stating, "To this end, we do not view the breakup of the nuclear family, in and of itself, to constitute a substantial harm to a child sufficient to justify state interference with a fit parent's decision to preclude a relationship between that child and his/her grandparents." Floyd v. McNeely, 1995 WL 390954, *4 (Tenn.Ct.App. 1995) Finally, the Appellate Court in McVay, citing *Nale v Robertson, Rust v. Rust, and Floyd v. McNeely,* held that mother's unmarried status did not diminish her fundamental privacy interest in rearing her child without unwarranted state interference.

Appellant submits that Tennessee case law has clearly established that regardless of whether a parent is unmarried, remarried, or divorced, the state has no right to interfere or infringe upon the fundamental right of parents to rear their children as they see fit. Accordingly, the fundamental liberty and privacy right of an individual to parent children is not dependent upon that individual being part of an intact nuclear family. Applying this principle to the issue at hand, it is logical to conclude that parents have the fundamental right to agree to

submit their parenting disputes to an agreed upon arbitrator for resolution rather than a Trial Court. The argument that such right does not exist and that the State has the unfettered right to impose its will upon the destiny of children due to the belief that there is implicit harm to children whose parents are divorcing is unconstitutional and conflicts with the fundamental principles of parents' rights to privacy set forth in the above cited cases. The fact that parties decide to divorce should not cause a presumption that a substantial threat of harm to children exists which allows the state to control all future decisions pertaining to the children regardless of what the parents of those children believe to be in their best interest. Given that this Court has repeatedly found that the constitutional right to parent without interference of the state exists whether the parent is married, divorced, unmarried, and/or remarried, it is illogical to conclude that the child custody statutes requiring a trial judge to resolve custody issues in the best interest of the child prohibit parents from consenting to submit custody issues to binding arbitration absent a showing that substantial harm would occur to the child as a result of such agreement. The State of Tennessee cannot interfere nor prohibit the exercise of the Constitutional Rights of the parents to resolve future disputes in this manner.

The language contained in T.C.A. §36-6-101 and T.C.A. §36-6-106 does not reflect that the legislature intended for the fundamental privacy rights of parents involved in a suit for annulment, divorce, separation or any other action involving custody of children to be treated any differently than the rights of parents not involved in such litigation. Moreover, the language of the statutes does not support the interpretation that upon a divorce being filed parents surrender their constitutional right to parent their children without interference from the state by protecting them from protracted trauma of litigation by choosing arbitration. The belief that there is implicit harm to children whose parents are divorcing that warrants the state's stepping in and controlling every aspect of what happens to those children, over the objections of the parents, is absurd. Often times, parents decide to divorce in order to protect their children from the contentious environment which exists in the home as a result of the breakdown of the marital relationship. The parent's act of divorcing is therefore in and of itself occurring in order to protect the children from harm and should not be summarily interpreted as an admission that the divorcing parents cannot make decisions which are in the best interest of their children or that the implicit harm occurring to the children warrants a hostile takeover of parental duties by the state.

The custody statutes do not state that custody matters cannot be submitted to arbitration. Tennessee Code Annotated §36-6-106 states that the court shall make a determination of custody based upon the best interest of the child "...in any other proceeding **requiring** the court to make a custody determination..." If parties choose to submit their disputes to arbitration, the trial court is not **required** to make a determination. The trial court, by entering an Order allowing arbitration of such matters, is not failing in its duties to protect the child by doing so. The trial court, upon review of such request, can decline to enter the order submitting such matters to arbitration if the trial court has reason to believe that the parties' agreement to arbitrate will result in substantial harm to the child. In 2007, it is important to note that this statute was amended to include section (d) which states:

"Nothing in subsections (a) and (c) shall be construed to affect or diminish the constitutional rights of parents that may arise during and are inherent in custody proceedings."

The language of the statute reflects the legislative intent to protect the fundamental constitutional rights of parents involved in custody proceedings by declaring that such rights still exist and entitle such parents to the same protection from unwarranted state interference as afforded to parents who are not involved in such proceedings.

The plain language of Tennessee Code Annotated §36-6-101 states "In a suit for annulment, divorce or separate maintenance, where custody of a minor child or minor children is a question, **the court may**, ...award the care, custody and control of such child or children to either of the parties to the suit..." Again the language does not mandate that the trial court and only the trial court make a custody determination. It is appropriate to construe custody statutes narrowly as such cases involve fundamental rights of parenthood. In re C.K.G., C.A.G., & C.L.G., 173 S.W.3d 714 (2005) Each word of a statute is presumed to have meaning and should be given full effect so long as in doing so the intention of the legislature is not violated. Id., 722.

The language of the Uniform Arbitration Act does not prohibit matters dealing with the custody and support of children from being arbitrated. The legislature is assumed to have knowledge of its prior enactments and to know the state of the law when it passes a statute. Owens v. State, 908 S.W. 2d 923, (Tenn.1994) The legislature obviously knew of the existence of the custody statutes and further knew that the clear language of such statutes did not prohibit the courts from allowing alternative dispute resolution processes from being used to resolve custody disputes such as binding arbitration. Accordingly, had the legislature intended to exclude custody matters from being determined by and through the process of binding arbitration under the

Uniform Arbitration Act, by an arbitrator agreed upon by the parties, the legislature would have included a provision which specifically excluded custody matters. The legislature did not do so.

Pursuant to the well founded principles of law governing statutory interpretation, the legislative intent should be ascertained by giving plain meaning to the language of the statute. In re Hogue, 286 S.W.3d 890, (2009). The language of §36-6-101 and §36-6-106 of the Tennessee Code Annotated is unambiguous and reflects the legislative intent that the best interest of the child is the paramount consideration in a Court's determination of custody. When parties resolve their own custody disputes by agreement, the Trial Court is not required to make such determination. It does not take away from the trial court's ability to protect the best interest of the child in the event that a threat of harm to the child arises since custody matters are always modifiable. Likewise, when parties agree to submit disputes regarding the care and custody of their children to an agreed upon arbitrator, it does not usurp the trial court's ability to protect children. In the event that a threat of harm against the child arises, the trial court always has the ability to review the decision of the arbitrator pursuant to the Uniform Arbitration Act. The trial court can deny the parties' request to enter a Consent Order submitting such matters to arbitration in the event that the Court has reason to believe that the child will be harmed through such process. The trial court remains the gatekeeper and

protector of the child when and if the Court finds it is necessary to exercise the right of intervention to protect the child's best interest due to risk of substantial harm.

In reviewing the decisions of other states as it relates to the availability of binding arbitration to parents desiring to resolve their disputes outside of the courthouse, Appellant submits the New Jersey Supreme Court's holding in Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009) is consistent with the principles found to exist by the Tennessee Courts as it relates to a parent's rights to rear their children without state interference. Specifically, in Fawzy, the New Jersey Supreme Court held that parental autonomy subsumes the right of parents to submit issues of child custody and parenting time to an arbitrator. Appellant found the logic used by the New Jersey Supreme Court in reaching this conclusion to be inherent in the reasoned opinions of this Supreme Court as it relates to parents' fundamental rights to make decisions which they, as parents, believe to be in the best interest of their children.

CONCLUSION

Tennessee case law reflects that the fundamental rights of all parents to rear their children free from unwarranted interference by the state should be protected regardless of the parents'

relationship status. To find that the act of divorcing lessens those fundamental rights would be unconstitutional and would discourage the institution of marriage rather than encourage it. The choice of parents to submit disputes regarding the care and custody of their children to an agreed upon third party approved by the Court is a choice that should not be interfered with absent a belief by the Court that such arbitration process would cause harm to the children. Within the constitutionally protected sphere of parental autonomy is the right of parents to choose the forum in which their disputes over child custody and rearing will be resolved. See Fawzy vs. Fawzy. The Uniform Arbitration Act as adopted by the State of Tennessee provides procedural mechanisms for a party to seek review by the trial court in the event that a party believes that the arbitrator's ruling will result in substantial harm to the child. Accordingly, the state's ability to protect children from harm, when shown to be necessary, is not at risk by allowing child custody issues to be determined through binding arbitration. Therefore, binding arbitration should be an available alternative to parents, like the Tuetkens, who agree to this alternative forum for the resolution of their disputes concerning the care, custody, and support of their children. Appellant respectfully submits that binding arbitration of child custody disputes is not inconsistent with Tennessee Statutes requiring, when necessary, trial judges to resolve custody issues in the best interest of the children.

OPPOSITION BRIEF

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(2)

No. 10-1123

Supreme Court, U.S.
FILED
APR 12 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

ELIZABETH SAMS TUETKEN,
Petitioner,

v.

LANCE EDWARD TUETKEN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee, Western Division

BRIEF IN OPPOSITION

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STATEMENT

Appellant and Appellee were divorced by Final Decree of Division VII of the Circuit Court of Shelby County, Tennessee (hereinafter "trial court"). The parties have two (2) minor children, namely Edward Hunter Tuetken, born October 4, 1991 and Lesley Ellis Tuetken, born September 21, 1996. Appellant has been designated as the primary residential parent of the children.

In the summer of 2006, Appellant unilaterally enrolled the parties' son into a private school in New York, without first notifying or consulting with Appellee. The parties agreed to submit to arbitration proceedings to address, among other issues, the issues of costs associated with the child's schooling in New York, as well as the effect that same would have upon parenting time. The parties submitted to arbitration with a family law attorney in Memphis, Tennessee on June 20, 2006. After the arbitration took place, and after the Arbitrator submitted her initial findings, the parties finally entered the Consent Order Appointing Parenting Arbitrator with the trial court.

Paragraph 4(b)(4) of said Consent Order affords both parties the expressed right to file a motion "challenging the order of the Parenting Arbitrator." Moreover, Paragraph 4(b)(6) provides as follows:

> In the event of an appeal, the decision of the arbitrator shall be binding on the parties pending the resolution of the matter by the Trial Court, and said decision shall carry with it a presumption of correctness.

Both parties initialized Paragraph 4(j) of the Consent Order to reflect their consent to the following provisions:

> I understand that the orders of the Parenting Arbitrator can be reviewed by the Court but that an objection must be made within the time specified in this stipulation.
>
> I understand that the Parenting Arbitrator cannot be called as a witness if I object to the Parenting Arbitrator's order.

In accordance with these provisions of the Order, Appellee filed a Motion Objecting to Ruling of Parenting Arbitrator with the trial court on July 7, 2006. That hearing was continued several times until April 30, 2007. At that hearing, the trial court ruled that Appellee's objections to Arbitration were premature, and the parties were ordered back to arbitration.

The parties returned to arbitration on May 21, 2007 and June 5, 2007. The Arbitrator mailed her Findings and Conclusions to the parties on August 15, 2007. In response, Appellee filed a Notice of Objections to the Ruling of the Arbitrator on August 28, 2007.

Appellee's Motion was heard on December 7, 2007. At that hearing, Appellant argued that, despite the judicial review provisions of the parties' Consent Order Appointing Parenting Arbitrator, review should be limited to the Tennessee Uniform Arbitration Act (hereinafter "TUAA"). Appellee argued that the parties had intended to submit to non-binding arbitration with *de novo* review by the trial court. The trial court

agreed with Appellee. On January 8, 2008, the trial court entered an Order on Motion for Ruling on Notice of Objections to the Ruling of the Arbitrator. The trial court modified certain aspects of the arbitrator's ruling, and reserved others for a full evidentiary hearing.

On February 6, 2008, Appellant filed a Motion for Permission to File T.R.A.P. Rule 9 Interlocutory Appeal. On that same date, Appellant also filed a Notice of Appeal as a matter of right to the Western Section of the Tennessee Court of Appeals (hereinafter "Court of Appeals"). On May 6, 2008, the Court of Appeals entered an Order denying the interlocutory appeal.

On August 5, 2009, the Court of Appeals delivered its written opinion on the appeal as of right. The Court of Appeals affirmed the ruling of the trial court. *Tuetken v. Tuetken*, No. W2008-00274-COA-R3-CV, 2009 WL 2391235 (Tenn. Ct. App. Aug. 5, 2009)(Pet. App. 34a). Specifically, the Court held that the parties had submitted to non-binding arbitration. (Pet. App. 43a).

On December 14, 2009, the Supreme Court of Tennessee granted Appellant's application for permission to appeal to that Court. Appellant timely submitted her Brief to the Supreme Court of Tennessee, largely regarding the issue of whether these parties had agreed to binding or non-binding arbitration. Upon receipt of Appellant's Brief, the Supreme Court of Tennessee entered an Order dated January 15, 2010, wherein the Court mandated additional briefing on the issue of "whether binding arbitration of child custody disputes is inconsistent

with Tennessee statutes requiring trial judges to resolve custody disputes in the best interests of children."

The Supreme Court of Tennessee ultimately rendered its opinion in this cause on September 22, 2010. *Tuetken v. Tuetken*, 320 S.W.3d 262 (Tenn. 2010). (Pet. App. 1a). The Court held that the parties had in fact entered into binding arbitration. *Id.* at 270. However, the Court held that the parties had intended to provide the trial court with far broader judicial review than was permitted by TUAA. *Id.* The Court held that "the provision for expanded judicial review embodies a basic assumption on which the agreement to arbitrate was based and as such is material." *Id.* at 271. The Court thus rescinded the parties' agreement to arbitrate, and remanded for further proceedings. *Id.*

The Court then ruled on the broader issue of "whether Tennessee law permits parties to submit to arbitration issues that implicate the trial court's duty to ensure that the best interests of children are protected." *Id.* The Supreme Court of Tennessee held that Tennessee custody statutes impose a duty on trial courts to protect the best interests of children. *Id.* The Court further held that this duty is consistent with the notion that the state stands in *parens patriae* of the minor children within its borders. *Id.*

The Supreme Court of Tennessee then reiterated its prior holdings that harm to a child is implicit in custody litigation. *Id.* at 272. (Citations omitted). As such, the Court held that parents can not relieve a trial court of its responsibility of ensuring that disputes between parents are resolved consistent with their children's best interests. *Id.* The Court further

noted that the limited review procedures set forth in TUAA were designed to promote the finality of arbitration awards. *Id.* However, this need is significantly diminished in child custody cases, as child custody orders are never truly final. *Id.* They are always modifiable upon the demonstration of the appropriate standard. *Id.* (Citations omitted).

Based upon all of the foregoing, the Supreme Court of Tennessee refused to recognize binding parenting arbitration. *Id.* The Court held that parents may only submit to non-binding arbitration, subject to a best interests determination by the trial court. *Id.* at 273.

As set forth hereinbelow, Appellee respectfully submits that the Tennessee Supreme Court's holding regarding parenting arbitration was appropriate, and that further review by this Honorable Court is not necessary.

REASONS FOR DENYING THE PETITION

I. The Supreme Court of Tennessee's refusal to recognize binding parenting arbitration is not a violation parents' rights to make decisions regarding the care, custody and control of their children.

Slightly more than a decade ago, this Honorable Court carefully explained that "there can be no doubt that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000)(Citations omitted). However, as noted in the Dissenting Opinion of that very case:

> A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and critically the child's own complimentary interest in preserving relationships that serve her welfare and protection.

Id. at 88 (Citations omitted).

In the case at bar, the Supreme Court of Tennessee recognized one of the more obvious limitations on parents' fundamental rights, when it held that custody litigation "invites, and indeed requires, governmental intervention into the parents' constitutionally protected fundamental liberty interest." *Tuetken v. Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010)(Citation omitted). The Supreme Court of Tennessee's refusal to recognize binding parenting arbitration is not a violation of parents' rights to rear their children without state interference, as Appellant insists. Rather, it is a safeguard of the state's responsibility to ensure that every custody order that a Tennessee trial court approves or creates is in the best interests of the children at issue. *Id.*

The Supreme Court of Tennessee noted that Tennessee statutes "impose a duty on trial courts to protect the best interests of children." *Id.* at 271. This

statutory scheme "comports with the longstanding notion that the state stands in *parens patriae* of the minor children within its borders." *Id.*

The Tennessee Uniform Arbitration Act ("TUAA") provides only extremely limited circumstances under which a court can modify an arbitrator's award. *Tenn. Code Ann. § 29-5-312.* As such, had the Supreme Court of Tennessee accepted Appellant's invitation to rule that parenting arbitration was subject only to the narrow review of the TUAA, the courts of Tennessee would have been deprived of their responsibility to ensure that every custody arrangement it orders or approves is in the best interests of the children of this state. *Tuetken v. Tuetken,* 320 S.W.3d 262, 272 (Tenn. 2010)(Citation omitted).

In essence, Appellant urges this Honorable Court to hold that parents embroiled in custody litigation have a fundamental right to circumvent the trial court, and allow someone other than the trial judge to make ultimate custody determinations. Contrary to the suggestion of Appellant, state courts have uniformly rejected the notion of binding parenting arbitration subject *only* to the narrow review procedures set forth in the Uniform Arbitration Act.

Certain jurisdictions have preserved their *parens patriae* duties by permitting parenting arbitration only if the trial court is afforded *de novo* review. *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. 1993); *Kovacs v. Kovacs*, 633 A.2d 425 (Md. App. 1993); *Harvey v. Harvey*, 680 N.W.2d 835 (Mich. 2004); *Patin v. Patin*, No. 150131, 1998 WL 972221 (Va. Cir. Ct. June 4, 1998); *In re Smith-Bartlett*, 976 P.2d 173, 178 (Wash. App. Div. 3, 1999); *In re Marriage of Popack*, 998 P.2d

[Uniform] Arbitration Act, unless there is a claim of adverse impact or harm to the child." *Id.* at 361. (Citation omitted). In the absence of proof of harm, the parties are limited to the remedies provided by the Uniform Arbitration Act. *Id.* (Citation omitted).

However, there appears to be one critical distinction between the law in New Jersey and that of the other states to address the issue:

> [W]hen matrimonial litigants [in New Jersey] reach a settlement on issues regarding child custody, support, and parenting time, as a practical matter the court does not inquire into the merits of the agreement. It is only when the parents cannot agree that the court becomes the default decision maker.

Id. at 360.

This reasoning of the New Jersey Court is completely contradictory with Tennessee law regarding the approval of custody and child support agreements. Apparently, New Jersey Courts have no obligation to inquire into the merits of custody agreements reached by parents. As expressly set forth above, Tennessee trial courts have an obligation to ensure that *every* custody agreement it either makes or approves is in the best interests of the child at issue.

Even if this Honorable Court adopted the New Jersey approach, the result in the case at bar would not change. To wit, the New Jersey Court was extremely specific as to the type of language which must be included if a court is to be bound by the narrow review procedures for final and binding

arbitration awards. *Fawzy*, 973 A.2d at 363. Not only were all of the essential elements missing from the parties' agreement in the present case, the parties did not even enter into a written agreement until after the arbitration had started.

Based upon the foregoing, New Jersey appears to be the only jurisdiction willing to delegate child custody determinations to non-judicial third-parties without *de novo* trial court review in certain circumstances. However, New Jersey Courts are not required to inquire into the merits of a custody matter until or unless the parties are unable to agree. *Fawzy*, 973 A.2d at 360.

The New Jersey Court attempted to satisfy its *parens patriae* role by awarding expanded review if harm can be demonstrated. The Supreme Court of Tennessee has repeatedly held that the requisite harm is implicit in any Tennessee custody case. *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993); *Tuetken v. Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010)(Citing *Tenn. Code Ann. § 36-6-401(a)*, which recognizes "the detrimental effect of divorce on many children"). As such, there is no need in Tennessee for a hybrid review.

Appellant concedes in her Petition for Writ of Certiorari that a state "may interfere with parental autonomy when harm to the health or welfare of a child exists." Appellant is simply dissatisfied with the Supreme Court of Tennessee's holding that sufficient harm is implicit in divorce/custody litigation.

It is important to note that the Supreme Court of Tennessee has not prohibited parenting arbitration

altogether. It has simply prohibited binding parenting arbitration. As noted by the Supreme Court of Tennessee, the purpose of the limited judicial review under TUAA is to promote the finality of arbitration awards. Plainly and simply, the need to promote the finality of an arbitration award does not and can not outweigh the need to protect the best interests of the children at issue.

II. The Supreme Court of Tennessee's refusal to recognize binding parenting arbitration does not implicate rights of parents who are uninvolved in custody litigation, nor does it constitute a denial of equal protection of the law to certain parents.

Appellant further argues to this Honorable Court that the Supreme Court of Tennessee's opinion "threatens to establish a class of parents who, as a result of seeking a divorce, are no longer entitled to the same protection under the law as afforded to all other parents." (Pet. App., p. 8). Yet, in the very same paragraph, Appellant also argues that the opinion prohibits all parents from submitting issues to parenting arbitration. (Appellant's Petition, p. 8-9). So in one breath, Appellant raises an equal protection argument on the basis that some parents can submit to binding arbitration while other cannot. Then in the next breath, Appellant expressly calls into question what basis the Supreme Court of Tennessee had "to prohibit non-divorcing parents from submitting matters to arbitration." (Petition, p. 9). These positions are completely contradictory.

Appellee respectfully submits that the Tennessee Court's opinion was neither expressly, nor implicitly

broad enough to even address parents who are uninvolved in custody litigation. To the contrary, the Suprem Court of Tennessee expressly framed the issue for determination as follows:

> whether Tennessee law permits **parties** to submit to arbitration issues **that implicate the trial court's duty** to ensure that the best interests of children are protected.

320 S.W.3d 262, at 271. (Emphasis Added).

The Supreme Court of Tennessee was clearly only addressing the right of *litigants* to arbitrate issues which implicate a *trial court's* duty to protect the best interests of children. Though Appellee is hard pressed to imagine any scenario whereby two parents who were uninvolved in litigation would desire parental arbitration, nothing in the *Tuetken* opinion infringes upon their right to do so. If non-litigating parents chose for whatever reason to arbitrate some parenting dispute, the duty of a trial court to ensure protection of the children's best interests is not implicated. As such, Appellee's argument about non-litigants being denied the right to arbitrate is nothing more than a *non-sequitur*. If, however, those same parents later seek ratification of the parenting arbitration award by a Tennessee court, the duty to protect children is implicated, and the parenting arbitration should not be binding upon the court.

Appellee would state that Appellant did not raise an "equal protection" argument before the Supreme Court of Tennessee, and that same was given short shrift in Appellant's Petition for Certiorari.

Nevertheless, Appellee respectfully submits that same is equally devoid of merit.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

> When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.' Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment'

Enquist v. Oregon Dep't of Agric., et. al., 553 U.S. 591, 602 (2008).

Appellee in the present case respectfully submits that Appellant has failed completely to demonstrate how parents in intact marriages and/or uninvolved in custody litigation are similarly situated to parents who are involved custody disputes. As the Supreme Court of Tennessee correctly held, custody litigation is a situation which not only invites, but requires state intervention. *Tuetken v Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010). Thus, there is no requisite disparate treatment amongst similarly situated classes of parents.

Even if it could be argued that these classes of parents are similarly situated, a distinction amongst these classes is rationally related to the legitimate state interest of ensuring that all custody arrangements either approved or ordered by Tennessee courts are in the best interests of the children at issue.

CONCLUSION

Appellee respectfully submits that the right to submit custody disputes to truly binding arbitration is not encompassed within the constitutionally protected right of parents to make private decisions regarding their children. By engaging in custody litigation, parents invite and demand state intervention into their lives. The state in turn has a *parens patriae* responsibility to protect the children at issue. It does so by ensuring that the custody orders it creates or approves are in the children's best interests. Submission to binding arbitration, subject only to the review of the Uniform Arbitration Act would deprive Tennessee Courts of this responsibility.

The refusal to recognize binding parenting arbitration does not implicate the Equal Protection Clause of the Fourteenth Amendment. We simply do not have similarly situated classes of parents being treated disparately. Even if it could somehow be argued that we did have similarly situated classes of parents being treated differently, the prohibition of binding parenting arbitration is rationally related to the legitimate state interest of ensuring that all custody arrangements either approved or ordered by Tennessee courts are in the best interests of the children at issue.

Appellee respectfully submits that Appellant has failed to demonstrate any compelling reason for this Honorable Court to grant her Petition for Writ of Certiorari, and for the reasons set forth herein, Appellee respectfully requests this Honorable Court to deny same.

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